No. 82-258

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

IN RE: COORDINATED PRETRIAL PROCEEDINGS IN PETROLEUM PRODUCTS ANTITRUST LITIGATION

MDL Docket No. 150 WPG

ALL STATE CASES

THE STATES OF ARIZONA, CALIFORNIA, FLORIDA, OREGON and WASHINGTON,

Petitioners,

—VS.—

MCGRAW-HILL, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF THE RESPONDENT IN OPPOSITION

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September 13, 1982

Counterstatement of Question Presented for Review

Did the United States Court of Appeals for the Second Circuit err in unanimously holding that the District Court should not have imposed civil contempt sanctions upon a non-party witness, the publisher of a daily newsletter covering the oil industry, for declining to disclose its confidential news sources in Petitioners' civil antitrust actions, where none of Petitioners' complaints alleged any involvement of the newsletter in the claims asserted in Petitioners' actions, and where there was no evidence in the record that the information sought was relevant to Petitioners' actions and could not be obtained elsewhere?

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Opinions Below

The per curiam opinion of the United States Court of Appeals for the Second Circuit, which is found at Appendix A to the Petition,* has now been reported at 680 F.2d 5 (2d Cir. 1982). The District Court did not file a written opinion, although its reasoning is set forth in the transcript of the hearing before the District Court on December 3, 1981 (JA 215-65).** The order of the District Court is found at Appendix B to the Petition.

Jurisdiction

Petitioners invoke jurisdiction of this Court under 28 U.S.C. § 1254(1).

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*Reference to the Petition is "Pet." and to Petitioners' Appendix A is "A".

**References preceded by "JA" are to the Joint Appendix submitted to the Court of Appeals.

Respondent makes no objection to the Petition on jurisdictional grounds.

Statutory Provisions Involved

This case involves the First Amendment of the Constitution of the United States and Section 1 of the Sherman Act, 15 U.S.C. § 1.

Statement of the Case

On May 18, 1982 the United States Court of Appeals for the Second Circuit (Friendly, Kaufman and Pierce, JJ.) unanimously vacated the order of District Judge William P. Gray, which held McGraw-Hill, Inc. ("McGraw-Hill") in civil contempt for declining to disclose the names of five confidential news sources for its daily newsletter, Platt's Oilgram Price Report ("Platt's"). In its well-reasoned per curiam decision, the Court of Appeals stated:

> ". . . Because the law regarding the qualified privilege of reporters as it applies in this case is relatively clear, there is no need for us to engage in an elaborate exegesis at this time. Since we believe that under controlling case law the record before us does not support a requirement that McGraw-Hill reveal the names of confidential sources, we vacate and remand the case to the district court." (A 5).

As the foregoing language of the Court of Appeals makes clear, the instant case is not one that warrants further review. No novel question is presented. The Court of Appeals correctly held, under the well-established three-part balancing test governing compelled disclosure of confidential sources in civil cases -- which requires a clear and specific showing of relevance, necessity and exhaustion of alternative sources before disclosure can be ordered -- that the barren record below does not support a requirement that McGraw-Hill's confidential news

sources be disclosed. Nor is there any conflict between the Court of Appeals' decision and this Court's decision in Branzburg v. Hayes, 408 U.S. 665 (1972), a holding involving journalists' obligations to testify before grand juries which the Court of Appeals correctly held (A 20n.12) was clearly distinguishable from the Petitioners' civil actions. There is no conflict in the Circuits and in any event review by this Court on the record below would be premature. Thus, there is no basis for this Court's review and the Petition for a writ of certiorari should be denied.

Proceedings Below

Platt's is a leading news service published by McGraw-Hill which reports both national and international news of sales, prices, current events, marketing devel-

opments and economic trends in the oil industry (A 7n.3). Judge Gray's contempt order was entered upon McGraw-Hill's decision not to comply with Judge Gray's order directing disclosure of McGraw-Hill's confidential news sources for Platt's following a hearing held in New York on December 3, 1981 on McGraw-Hill's claim of privilege.

Disclosure had been requested pursuant to a subpoena duces tecum served by Petitioners on Platt's as a non-party witness in connection with Petitioners' civil antitrust actions against numerous oil companies pending before Judge Gray.*

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*The actions of Petitioners, the States of Arizona, California, Florida, Oregon and Washington, alleging, inter alia, violations of Section 1 of the Sherman Act, 15 U.S.C. § 1, were consolidated for pre-trial proceedings before Judge Gray in the Central District of California (MDL-150). Judge Gray held McGraw-Hill in contempt while sitting in the Southern District of New York pursuant to 28 U.S.C. § 1407(b).

The subpoena required production, inter alia, of any documents showing the names of persons with whom Platt's communicated concerning petroleum products prices for the time period 1970-73 (Pet. 4). The names of the sources sought to be disclosed were listed in a document in the possession of Platt's editor-reporter Ernest McClelland.*

Judge Gray ordered disclosure of McGraw-Hill's confidential news sources

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*Petitioners' extensive discussion of events purportedly occurring prior to the December 3, 1981 hearing -- a discussion which, inter alia, implies that McGraw-Hill sanctioned the willful destruction of a "list" (actually a personal address book) of confidential sources of Platt's former editor-reporter, J. Bruce Chalfant -- is untrue (JA 178-84) and in any case irrelevant. Petitioners' counsel acknowledged, at the December 3 hearing, that their application for contempt sanctions relating to the address book was "now behind us" (JA 220-21), and agreed that the privilege issue was the sole issue before the Court (JA 217-18).

solely on the basis of the Petitioners' speculation -- totally unsupported in the record or even in the Petitioners' complaints -- that Platt's might have been an unwitting medium through which the defendant oil companies exchanged pricing information in furtherance of an alleged price-fixing conspiracy. As the Court of Appeals determined:

> "The States argue that oil companies may have transmitted price information among themselves by releasing that data to reporters of Platt's. We find no such allegation, however, in their complaints. Rather, the pleadings suggest that the purportedly unlawful communications were directly accomplished through secret telephone lines, unlogged calls and surreptitious meetings." (A 13).*

"This critical omission", as the Court of Appeals correctly found, was "compounded

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*The complaints were not part of the record below; they were submitted by Petitioners' counsel only when requested by the members of the Second Circuit panel at oral argument.

by the complete failure of the States to present any evidence indicating that the involvement of Platt's in fact occurred." (A 13).* Indeed, as the Court of Appeals noted, "Judge Gray acknowledged the absence of proof that the sources possessed relevant information: 'Now I hasten to add I certainly don't know whether any such exchanges took place. I have no information on that whatever.'" (A 13-14).

Petitioners also failed to offer any evidence of any attempt to obtain the

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*Petitioners did not call any witnesses or submit any affidavits or other foundational evidence in support of their motion to compel disclosure. In addition, Petitioners rejected McGraw-Hill's suggestion that Messrs. Chalfant and McClelland be deposed prior to compelling disclosure of their confidential news sources. When the Petitioners later did depose Mr. Chalfant, after Judge Gray ordered him to disclose his sources, Chalfant testified that two of the former sources were not even employed by any defendant oil company (A 14n.10).

information sought from alternative sources. As the Court of Appeals aptly stated:

> "[I]n this case, the States have failed to explore any alternative means of discovering whether the oil companies used Platt's as part of their purported price fixing conspiracy. While hundreds of depositions have already been taken, there is no indication that anyone was asked the simple question 'Have you ever communicated pricing information to Platt's.'" (A 16-17).

Thus the record demonstrates that there was no factual basis - let alone a showing of high relevance, necessity and exhaustion of alternative sources, as the law requires - for compelling disclosure of McGraw-Hill's confidential sources. The Court of Appeals properly vacated Judge Gray's order and remanded for development of an adequate factual record.

Reasons for Denying the Writ

POINT I

THE COURT OF APPEALS PROPERLY APPLIED THE WELL-ESTABLISHED THREE-PART BALANCING TEST IN DENYING DISCLOSURE OF McGRAW-HILL'S CONFIDENTIAL NEWS SOURCES

The Courts of Appeals have consistently held, since this Court's decision in Branzburg v. Hayes, 408 U.S. 665 (1972), that disclosure of a journalist's confidential news sources may not be compelled in a civil action absent

> "a clear and specific showing that the information [sought] is: highly material and relevant, necessary or critical to the maintenance of the claim, and not obtainable from other available sources." (A 11).

Accord, Zerilli v. Smith, 656 F.2d 705, 713-15 (D.C. Cir. 1981); Riley v. City of Chester, 612 F.2d 708, 716-17 (3d Cir. 1979); Silkwood v. Kerr-McGee Corp., 563 F.2d 433, 438 (10th Cir. 1977); Baker v. F & F Investment, 470 F.2d 778, 783-85

(2d Cir. 1972), cert. denied, 411 U.S. 966 (1973). Cf. In re Roche, 448 U.S. 1312 (1980) (Brennan, J., in chambers).*

These reasonable standards are necessary to avoid the damaging effect that compelled disclosure can have on a journalist's confidential source relationships and the press' First Amendment role in gathering and disseminating the news. Zerilli v. Smith, supra, 656 F.2d

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*The applicable principles are summarized by the Court of Appeals in Riley v. City of Chester, supra:

> "The requisite balance cannot be made without a showing 'as to the effort to obtain [the information] from other sources.' The party seeking the information must show 'that his only practical access to crucial information necessary for the development of the case is through the newsman's sources.' Plaintiffs must show that they exhausted other means of obtaining the information. The material sought must 'provide a source of crucial information going to the heart of the [claim]....'" 612 F.2d at 716-17 (citations omitted).

at 710-11; Baker v. F & F Investment, supra, 470 F.2d at 782.

Since the record below is devoid of any pertinent allegations in the Petitioners' complaints or the evidentiary showing necessary to meet the three-part test, the Court of Appeals' unanimous order was proper.

POINT II

THE COURT OF APPEALS' DECISION IS NOT IN CONFLICT WITH THIS COURT'S DECISION IN BRANZBURG v. HAYES

Petitioners argue (Pet. 10-13), for the first time in this case, that this Court's decision in Branzburg precludes application of the three-part balancing test.* Petitioners' contention is without merit.

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*Petitioners' argument is contrary to their position below. As evidenced by

(Footnote continued)

Branzburg, which the Second Circuit correctly noted arose in the context of a grand jury setting (A 20n.12), is inapposite to these civil actions. Thus the Court of Appeals held:

> "[I]n Baker v. F & F Investment, supra, 470 F.2d at 784-85, it was this Court's view that Branzburg was limited to the grand jury setting: 'Manifestly, the Court's concern with the integrity of the grand jury as an investigating arm of the criminal justice system distinguishes Branzburg from the case presently before us.'" (A 20n.12), quoting Baker v. F & F Investment, supra, 470 F.2d at 784-85 (1972).

(Footnote continued)

the point headings in their brief on appeal -- e.g., "Relevance," "Discovery of the Identity of Price-Fixing Conspirators Is Very Necessary to Plaintiff-Appellee's Case," and "The District Court Did Not Abuse Its Discretion In Finding No Alternative Sources of the Subpoenaed Evidence Available to Plaintiffs" (Brief for Plaintiffs-Appellees 19, 21, 23) -- Petitioners acknowledged that the three-part test must be satisfied and argued, unsuccessfully, that its requirements had been met by Petitioners' speculation rather than by demonstrated concrete evidence.

Accord, Zerilli v. Smith, supra, 656 F.2d at 711-12; Riley v. City of Chester, supra, 612 F.2d at 714; Gilbert v. Allied Chemical Corp., 411 F. Supp. 505, 510 (E.D. Va. 1976).

Moreover, this Court recognized in Branzburg that even in criminal cases the press' claim of privilege must be balanced against the public's interest in criminal law enforcement. Justice Powell, who cast the deciding vote, made clear that:

> "The asserted claim to privilege should be judged on its facts by the striking of a proper balance between freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct. The balance of these vital constitutional and societal interests on a case-by-case basis accords with the tried and traditional way of adjudicating such questions." 408 U.S. at 710 (Powell, J., concurring).

If the balancing test applies in a criminal case, it must apply with equal or

greater force in these civil cases where neither non-party witness McGraw-Hill* -- nor any party -- has been charged with a crime or is the subject of a criminal investigation.**

In the present case, unlike Branzburg, there is no evidence that McGraw-Hill was

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*As the Court of Appeals specifically noted, one of the Petitioners expressly disavowed any accusation that McGraw-Hill was a co-conspirator (A 15n.10).

**See also Baker v. F & F Investment, supra, 470 F.2d at 785:

> "If, as Mr. Justice Powell noted in that case [Branzburg v. Hayes, 408 U.S. 665 (1972)], instances will arise in which First Amendment values outweigh the duty of a journalist to testify even in the context of a criminal investigation, surely in civil cases, courts must recognize that the public interest in non-disclosure of journalists' confidential news sources will often be weightier than the private interest in compelled disclosure."

involved in or witnessed any criminal activity.* The Petitioners' alleged "need" for the identity of McGraw-Hill's confidential sources is nothing more than mere speculation and their demand for compelled disclosure a fishing expedition which, as the Court of Appeals correctly held, "bear[s] at most a tenuous and speculative relationship to their antitrust claims." (A 13).**

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*As the Court of Appeals noted, any involvement in a price fixing conspiracy "must certainly be developed" before "assuming" that any alleged communication was "part of a violation of the antitrust laws." (A 15n.10).

**Cf. Branzburg v. Hayes, supra, 408 U.S. at 710 (Powell, J., concurring) ("...if the newsman is called upon to give information bearing only a remote and tenuous relationship to the subject of the investigation ... an appropriate protective order may be entered").

POINT III

THERE IS NO CONFLICT IN THE CIRCUITS AS TO THE PROPER BALANCING TEST TO BE APPLIED IN CIVIL CASES.

The Petitioners' contention (Pet. 13-14) that the Ninth Circuit applies a more restrictive balancing test in civil cases is specious. Farr v. Pitchess, 522 F.2d 464 (9th Cir. 1975), cert. denied, 427 U.S. 912 (1976), upon which the Petitioners rely,* was a criminal case in which the trial court ordered disclosure of a reporter's source who had leaked a prejudicial witness' statement to the reporter in direct violation of the trial court's prior order barring publicity.

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*Petitioners' reliance upon Farr is also inconsistent with their argument below. In their brief on appeal Petitioners cited Farr in support of the balancing test which they now seek to reject. (Brief for Plaintiffs-Appellees 10).

In upholding the trial court's decision the Ninth Circuit relied upon the defendant's constitutional guarantee of a fair trial -- a consideration not present in these civil cases.

The Ninth Circuit's statement in Farr, in dicta, that ". . . the opinion [Branzburg] appears to teach broadly enough to be applied to other civil or criminal judicial proceedings . . ." was not intended to limit the Court of Appeals' power and duty to consider the state of the record as part of the balancing process. As the Ninth Circuit was careful to observe:

> "The application of the Branzburg holding to non-grand jury cases seems to require that the claimed First Amendment privilege and the opposing need for disclosure be judicially weighed in light of the surrounding facts and a balance struck to determine where lies the paramount interest." 522 F.2d at 468 (Emphasis added).

Indeed, the district courts in the Ninth Circuit that have addressed the issue of the reporter's privilege in civil cases since Farr have followed the three-part test applied by the Court of Appeals in this action. See e.g., Los Angeles Memorial Coliseum Commission v. National Football League, 89 F.R.D. 489 (C.D. Cal. 1981) (subpoena quashed in civil antitrust action where party failed to show exhaustion of alternative sources or that the information sought went to the heart of any underlying claim).

POINT IV

THE COURT OF APPEALS PROPERLY DECLINED TO ASSIGN THE ANTITRUST LAWS A PREFERRED POSITION OVER McGRAW-HILL'S FIRST AMENDMENT RIGHTS

The Petitioners' argument that the antitrust laws should, ipso facto, give the Petitioners the right to disclosure of McGraw-Hill's confidential news

sources is equally without merit. As the Court of Appeals correctly held:

> "The States invite us to disregard these established principles [three-part balancing test] and permit compelled disclosure of confidential sources in the absence of this constitutionally mandated showing simply because the underlying litigation involves the antitrust laws. We decline the invitation to hold violations of the antitrust laws to be sui generis. Although it is true that the Sherman Act represents Congress's strong commitment to fostering a competitive marketplace, enactment of a statute cannot defeat a constitutional provision." (A 18).

As the Court of Appeals explained:

> "'. . .[i]t would be inappropriate for a court to pick and choose in such gross fashion between different acts of Congressional legislation, labelling one 'exceedingly important' and another less so, without specific directions from the Legislature.'" (A 19), quoting Baker v. F & F Investments, supra, 470 F.2d at 783.

Petitioners' reliance upon this Court's decision in California Liquor Dealers v. Midcal Aluminum, 445 U.S. 97 (1980), is misplaced. Midcal acknowledges a substantial Congressional policy

in favor of competition; it does not hold that the antitrust laws are superior to First Amendment guarantees or that they are of any greater constitutional significance than other statutes evidencing equally strong federal policies such as the civil rights laws, which were accorded no special position in Baker v. F & F Investment, supra. See also Matter of Forbes Magazine, 494 F. Supp. 780 (S.D.N.Y. 1980). The mere fact that the antitrust laws were enacted pursuant to the Commerce Clause is without moment; all federal statutes to be valid must be grounded upon (and not be inconsistent with) some provision of the Constitution.*

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*Petitioners also ignore lower court decisions which have applied the three-part balancing test notwithstanding the allegation, similar to Petitioners', that the journalist was an "unwitting participant" in an alleged antitrust conspiracy.

(footnote continued)

In all events, if the question of the scope of the reporter's privilege in civil antitrust actions were of sufficient importance to warrant this Court's review, it should not be addressed on the barren record and pleadings below, particularly where the Court of Appeals by its remand has not foreclosed Petitioners from seeking out other sources or developing the record. This Court should not

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(footnote continued)

In re Consumers Union, 495 F. Supp. 582 (S.D.N.Y. 1980); Citicorp v. Interbank Card Association, 4 Med. L. Reptr. 1429 (S.D.N.Y. 1978). In both cases disclosure was denied because the claimants had failed to make the necessary showing.

decide an issue of such constitutional dimensions in a factual vacuum.

Conclusion

For the foregoing reasons the Petition for a writ of certiorari should be denied.

September 13, 1982

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